No. 173.

OCT 9 1902

JAMES H. McKENNEY, Clerk.

In The Supreme Court

OF THE United States of America.

GEORGE A. FOSTER, Sheriff of Noble County, Territory of Oklahoma and G. T. BRYAN as Treasurer of Noble County, Territory of Oklahoma, Appellants,

vs.

I. T. PRYOR; I. T. Pryor & Co., a partnership composed of I. T. Pryor, J. H. Morris and Howard Ross; C. A. Keeran; Stafford Land & Cattle Company, a foreign corporation doing business in the Territory of Oklahoma under the laws thereof; M. L. Hite; W. R. Moore; P. S. Witherspoon and Phillip Witherspoon, partners doing business under the firm name and style of P. S. Witherspoon & Son; P. S. Witherspoon and Frank Witherspoon, partners doing business under the firm name and style of P. S. and F. Witherspoon; P. S. Witherspoon and Ed. T. Bomar, partners doing business under the firm name and style of Witherspoon & Bomar; 101 Live Stock Company, Appellees.

No. 173

Appeal From Supreme Court Oklahoma Territory.

Motion to Dismiss and Brief of Appellees.

HENRY E. ASP,
S. H. HARRIS,
W. L. BARNUM,
Attorneys for Appellees.

In The Supreme Court

OF THE

United States of America.

GEORGE A. FOSTER, Sheriff of Noble County, Territory of Oklahoma and G. T. BRYAN as Treasurer of Noble County, Territory of Oklahoma,

Appellants,

vs.

I. T. PRYOR; I. T. Pryor & Co., a partnership composed of I. T. Pryor, J. H. Morris and Howard Ross; C. A. Keeran; Stafford Land & Cattle Company, a foreign corporation doing business in the Territory of Oklahoma under the laws thereof; M. L. Hite; W. R. Moore; P. S. Witherspoon and Phillip Witherspoon, partners doing business under the firm name and style of Witherspoon & Son; P. S. Witherspoon and Frank Witherspoon, partners doing business under the firm name and style of P. S. and F. Witherspoon; P. S. Witherspoon and Ed. T. Bomar, partners doing business under the firm name and style of Witherspoon & Bomar.

Appellees.

No. 173

NOTICE OF MOTION TO DISMISS.

To Horace Speed, Attorney for Appellants:

You are hereby notified that on Monday, the 20th day of October, 1902, the above-named appellees will present to the Supreme Court of the United

States, their motion to dismiss the appeal in the above cause, together with the foregoing brief and argument upon said motion and the brief upon the merits of said cause, hereto attached.

HENRY E. ASP,
S. H. HARRIS,
W. L. BARNUM,
Attorneys for Appellees.

Service of the above and foregoing notice, together with the motion to dismiss appeal and the brief and argument thereon and the brief and argument upon the merits, referred to in the foregoing notice, is hereby accepted, this .... day of September, 1902.

....
Attorney for Appellants.

In The Supreme Court

OF THE

United States of America.

GEORGE A. FOSTER, Sheriff of Noble County, Territory of Oklahoma and G. T. BRYAN as Treasurer of Noble County, Territory of Oklahoma,

Appellants,

vs.

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Appellees.

No. 173

Motion to Dismiss and Brief of Appellees.

HENRY E. ASP,
S. H. HARRIS,
W. L. BARNUM,
Attorneys for Appellees.

In The Supreme Court

OF THE

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GEORGE A. FOSTER, Sheriff of Noble County, Territory of Oklahoma, and G. T. BRYAN as Treasurer of Noble County, Territory of Oklahoma,

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Appellees.

No. 173

MOTION TO DISMISS.

Come now the above-named appellees and move the court to docket and dismiss the appeal of the above-named appellants for the following reasons:

First. That said appeal was not docketed in

this Court, in the office of the Clerk before the return day, towit: The 6th day of October, 1901, as appears from the date of the official filing of the record herein.

Second. Because this court has no jurisdiction of said appeal, in as much as the amount in controversy between the appellants and any one of the appellees does not amount to the sum of five thousand dollars, and the claims of several plaintiffs in the trial court, resting upon different facts and legal grounds, are attempted to be united in one suit and appeal for the purpose of presenting a cause involving a sufficient amount to give this court jurisdiction.

HENRY E. ASP,
S. H. HARRIS,
W. L. BARNUM,
Attorneys for Appellees.

BRIEF AND ARGUMENT
On Motion to Dismiss Appeal.

The first ground of the motion to dismiss is based entirely upon the record of the official filing of the case in this court and the appeal and citation, and it is claimed that appellants have not complied with Rule Nine, of this Court.

Under the second ground of the motion appellees contend that the amount of five thousand dollars is not involved in the cause or the appeal, and that several distinct and different causes of action are attempted to be set up in a single case, by a large number of different parties.

The petition presents a large number of different issuable facts on the part of the various parties, and only a portion of the facts relied upon are common to all the parties to the action.

Where the parties severally rely upon facts not common to all their causes of action are several, and can not be joined in one action for the purpose of giving this court jurisdiction, or for any other purpose.

Webber vs. Dillon, 7 Oklahoma, 568.

Chamberlin, et al, vs. Browning, et al, 177 U. S., 604.

We suggest a few of the many different issuable facts under the statutes of this territory:

First: Residence of the appellees.

Second: As to the time of bringing the property into the Reservation referred to in the petition.

Third: The purpose for which the cattle were brought into and kept in the said reservation.

Fourth: The assessment of and payment of taxes upon the same cattle for the same year in the State of Texas.

Fifth: By what officer the assessment complained of was made.

Sixth: Lack of opportunity on the part of the tax-payer to make proper showing of the prior assessment and taxation upon the same property in the foreign state.

Seventh: The allegation that the property was assessed without the knowledge of the owner.

Eighth: That the assessment complained of was made without the officer having visited the same for the purpose of ascertaining its true value.

Ninth: Allegations as to proof and showing made before the Board of County Commissioners with reference to the correction of the assessments.

Tenth: The Proceedings of the Board of County

Commissioners, without notice to the tax-payers, after the levies had been set aside.

Eleventh: The tender of taxes for Court and Territorial purposes, prior to the beginning of the injunction proceeding.

In order that the foregoing suggestions may be understood in the light of our statutory law we quote the provisions in relation thereto:

Section 5583, Compiled Laws, Oklahoma, 1893: * * * "In order to make the assessment such assessor shall demand from each person or firm, and from the president, cashier or managing agent of each corporation, association or company within his county, a statement, under oath or affirmation, of all the real estate within the county, and personal property owned by, claimed or in the use, possession or control of such person, firm, corporation or company, whether held by the party sworn for himself or as agent for another, and shall set out in such sworn statement an itemized account of all classes of property, by this act defined as subject to assessment, by him so held or controlled." * * *

Section 5584. "If the owner of any property not listed by another person shall be absent or unknown to the assessor, he shall ascertain and estimate the value thereof, and if the name of such owner be known to the assessor the property shall be assessed in his, her, or their name, etc."

Section 1, Article 5, Chapter 43, Session Laws, 1895: "When any personal property shall be located

in any county of this territory, after the first day of March of any year, which shall acquire an actual situs therein before the first day of September, such property is taxable therein for that year, and shall be assessed and placed on the tax roll, and the tax collected as provided by this act."

Section 2. "Whenever any live stock shall be located in this territory for the purpose of grazing, it shall be deemed to have acquired an actual situs therein as contemplated by this act."

Section 3. "When any person, association or corporation shall settle or organize in any county of this territory, and bring property therein after the first day of March and prior to the first day of September, in any year, it shall be the duty of the assessor to list and return such property for taxation for that year, unless the owner thereof shall show to the assessor, under oath, that the same property has been listed for taxation on that year in some other state, or county in this territory, etc."

Section 1, Article 6. * * * "That when any cattle are kept or grazed, or any other personal property is situated in any unorganized country, district or reservation of this territory, then such property shall be subject to taxation in the organized county to which such country, district or reservation is attached for judicial purposes, and the Board of County Commissioners of such organized county or counties to which such unorganized country, district or reservation is attached, shall appoint a special assessor each year, whose duty it shall be to assess such property thus situated or kept; such special assessor shall have all the powers and be required to perform all the duties of the township assessor. * * *

Any person who feels aggrieved by his assessment in any such country, district or reservation, may appear before the Board of County Commissioners for the organized county to which such country, district or reservation is attached for judicial purposes, at their session, commencing on the first Monday in June, and the Board of County Commissioners shall have power to correct any and all errors, etc."

Prior to 1897 assessments in the organized counties were made by the Township Trustee of each Township, under the provisions of Compiled Laws 1893, section 6061.

Section 6061. "The Township Trustee of each municipal township in this territory shall be, by virtue of his office, the assessor of his township, and shall give an additional bond to the one already required by law for the faithful performance of his duties as such assessor."

Article 7, Chapter 32, Laws 1897. Section 1. "The Boards of County Commissioners of the various counties of the Territory of Oklahoma are hereby empowered to correct, either upon the assessment rolls or upon the tax rolls of the county, any double or erroneous assessment of property for taxation for any particular year in the manner provided in the next section, and not otherwise; provided, that this act shall in no wise be construed as a grant of power to Boards of County Commissioners to equalize valuations of property for taxation, as between individuals."

Section 2. "Whenever, at either of the regular meetings of the said Boards in January, April, July

or October, upon complaint of the person or persons beneficially interested, their agent or attorney, it shall be made to appear by the testimony of the claimant and at least one reputable witness, borne out by the records of the county, that the same property, whether real or personal, has been assessed more than once for the taxes of the same year, or that property, whether real or personal, has been assessed in the county for the taxes of a year to which the same was not subject, the said Board is hereby empowered to issue to the complainant a certificate of error, showing that the complaint has been investigated by said Board, that the said Board has been satisfied of the truth of the allegations of said complaint, and direct the same to the county treasurer of their said counties directing the said county treasurer to accept the said certificate as a payment of cash to the amount found by the said Board to have been unjustly assessed, which said amount shall be named in the said certificate, and shall, by the treasurer, be credited upon his tax roll against the tax so found to be erroneous; and the treasurer shall retain the said certificate and shall be credited with the same as cash in his settlement as such treasurer."

Article 10, Chapter 32, Laws 1897. Section 1. "That Section 1 of Article 5, Chapter 43, of an act approved March 8th, 1895, be, and the same is hereby amended so as to read as follows: Section 1. When any personal property shall be located in any county of this territory after the first day of March of any year, which shall acquire an actual situs therein before the first day of September, such property is taxable therein for that year, and shall be assessed and placed upon the tax roll and the tax collected as

assessor to give, under oath or affirmation, the statement required by this section, the assessor shall ascertain and estimate from the best information he can obtain, the number, amount, and cash value of all the several species of property required, and shall list the same accordingly, and the value so fixed by the assessor shall not be reduced by the county board of equalization."

Section 1, Article 2, Chapter 28, Laws 1899. "That from and after the passage and approval of this act no taxes shall be assessed, levied or collected in any unorganized country, district or reservation which shall be, or which may hereafter be, attached to any county for judicial purposes, except for the territorial and court funds."

These various statutory provisions, while applicable to the motion to dismiss, by showing the application of the facts set forth in the petition for injunction, and the various questions of both law and fact raised by the allegation in reference to the rights of the individuals who have joined their complaints in one petition, will also be convenient for reference in connection with the brief upon the merits.

BRIEF AND ARGUMENT ON MERITS.

The facts and matters of contention are so fully set forth in the petition for injunction and the opinion of the court that it is unnecessary to further enlarge this brief with them.

In so far as the opinion of the court complained of on this appeal deals with the validity of the law of the territory passed in 1899, and complained of by appellants herein, we have little to complain of, but there are several matters raised in the petition for injunction which are constantly arising, and are now pending in a large number of cases in the courts of the territory, which cases are being continued from time to time awaiting the disposition of this case.

The learned Judge who delivered the opinion of the Supreme Court of the territory concludes, from the decision of this court in the case of Gay vs. Thomas, 169 U. S., 264, that the reservations in question form a part of the same taxing district as the county proper, but we do not agree that such is the proper interpretation of that decision. The language of the act attaching these reservations to organized counties "For Judicial Purposes" contains its own limitations. It is certainly true that the legislature of the territory have power to levy taxes upon property in these reservations, but we do not think that it necessarily follows that they become a part of the same taxing district.

We disagree with the court again in the matter of the repeal of the act of 1895 in reference to the appointment of special assessors to assess property in

the reservations. The act of 1897, creating the office of county assessor and defining his duties, does not, in express terms, repeal the special assessor act, and there is not the slightest conflict between the provisions of the two acts.

These various statutory provisions upon the subject of taxing property in the reservations were all before the legislature of 1897, and if they had desired to repeal the special assessor act it would have been an easy matter to have said so. The laws of 1893, by reference and the terms of the special assessor act, became a part of that act as fully as though each and every provision had been repeated in the latter act. The repeal of those provisions in relation to township assessors did not repeal by implication or otherwise the later law into which they had been enacted. As there is not the slightest conflict between the two laws—the Special Assessor Act of 1895 and the County Assessor Act of 1897—we fail to see why there should be a repeal by implication. The legislature did not repeal the act of 1895, they did not intend to repeal it, and they passed no law in conflict with its terms or purpose. In view of these facts we see no occasion for a repeal by the court.

Many important questions presented by the petition and in the petition in error in the Supreme Court of

the territory are ignored in the decision complained of here. This is probably largely due to the fact that two cases were considered together and these questions were not common to both cases. We present these questions for consideration by this court on account of their importance and the large number of pending cases involving the same questions.

If the county assessor had no authority to assess the property in the reservations, then the assessment was void and the entire tax should be enjoined.

Relying upon every ground for injunction stated in the petition, we submit further suggestions without regard to arrangement.

In Cooley on Tax, 2d Ed., 352-353, it is said:

"The assessment being so important, the statutory provisions respecting its preparation and contents ought to be observed with particularity. They are prescribed in order to secure equality and uniformity in the contributions which are demanded for the public service, and if officers, instead of observing them, may substitute a discretion of their own the most important security which has been devised for the protection of the citizen in tax cases might be rendered valueless. Assessments must therefore be made by the proper officers or it will be void; and if a board of review which has power to appoint

the assessors and afterwards review their work should appoint any of their own members to that office, the appointment would be void and an assessment made by the appointees illegal.

"The assessment must be made by the officers duly elected or appointed for that purpose, and it is especially essential to its validity, the validity of the list as a basis of taxation, and therefore to the validity of the tax itself, that the assessment should be made by the officer having competent authority and the qualification, required by law."

25 Enc. Law, 202.
Republic L. Ins. Co. vs. Pollock, 75 Ill., 292.
Street R. Co. vs. Surrell, 88 Ill., 535.
Felamthal vs. Johnson, 104 Ill., 21.
People vs. Lots in Ashley, I22 Ill., 297.
Twombley vs. Kimbrough, 24 Ark., 159.
People vs. Hastings, 29 Cal., 449.
People vs. White, 47 Cal., 616.
Reily vs. Lancaster, 39 Cal., 354.
Hawkins vs. Jonesboro, 63 Ga., 527.
Williams vs. Corcoran, 46 Cal., 553.
Evansville, Etc., R. Co. vs. Hays, 118 Ind., 214.
People vs. Lathrop, 3 Col., 428.
St. vs. Segoine, 53 N. J. L., 339.

Hoffman vs. Woods, 40 Kan., 382, (19 Pac., 805.)
Rood vs. Mitchell County, 39 Ia., 444.
Bailey vs. Fisher, 38 Ia., 229.
Du Page County vs. Jenks, 65 Ill., 275.
Paldi vs. Paldi, 84 Mich., 346.
People vs. Parker, 117 N. Y., 86.
People vs. Ward, 105 Ill., 620.
Payson vs. Hall, 30 Me., 298.
Pike vs. Hanson, 9, 491.
Syman vs. Anderson, 9 Neb., 367.
Wadleigh vs. Maranthon Co. Bank, 58 Wis., 546.
Toby vs. Haggarty, 23 Ark., 370.
Campbell vs. Mulford, 20 N. J. L., 49.
Taylor vs. Youngs, 48 Mich., 268.

Where the assessment upon which the sale of lands for taxes is based was made by the officers of the town in which said lands were not and never had been situated, and whose officers had never before exercised any jurisdiction over the lands, the deed issued upon said sale is void and the statute of limitations cannot be invoked in its support.

Wadley vs. Warton Co. Bank, 58 Wis., 546.
Cooley on Taxation, 352.
Thurston vs. Little, 3 Mass., 429.

Thayer vs. Starns, 1 Pick., 482.

Miller vs. Hale, 26 Pa. St., 432.

Matter of Nichols, 54 N. Y., 62.

Driggins vs. Casherly, 71 Ala., 529.

Early vs. Whittingham, 43 Ia., 162.

Quiney vs. Lawrence, 1 Idaho, 313.

Waller vs. Hughes, 11 Pac., 127.

Parker & White vs. Overman, 18 Howard, 137, 59 U. S.

Book 15 L. E., U. S., 318.

March vs. Supervisors, 42 Wis., 502.

From the decisions cited it appears that statutes in reference to assessments of property are mandatory, and if they have not been substantially complied with the levy based thereon will be void.

In Gray vs. Stiles, 6 Okla., 513, the Supreme Court of the Territory says:

"Assessment is the same as valuation of the property taxed, and this assessment or valuation must be made by the officer or officers to whom it is by the statute expressly committed; that the duty and function of assessment cannot be shared in by any officer to whom it is not so granted by the very language of the statute."

If J. H. Nelson, as county assessor of Noble County, did have the power and authority to assess the property of plaintiffs situated in Ponca and Otoe

Reservation, without appointment and qualifications as special assessor, was it necessary for him to view the property and estimate its value and give plaintiffs an opportunity to show any reason why the same should be exempt from taxes?

The decisions of our Supreme Court, as we understand them, are not entirely in harmony upon this proposition. They appear to have treated the statutes of this territory governing assessors as directory only, and reach the conclusion that any amount or all of the statutory direction could be ignored without affecting the validity of the assessment or the levy of taxes thereon.

If the statute of the territory had been complied with in reference to viewing the property and demanding a list thereof, an opportunity to show exemption would have been presented to plaintiffs. We believe that the legislature, in passing the act referred to in reference to exemptions of property from taxation, which had been taxed for the same year in another county or state, had in mind the provisions of other statutes with reference to the manner of making assessments, and supposed that opportunity would be furnished to all the property owners to take advantage of the exemption specified.

The general statutes of the territory in reference to assessments should be construed as a part of the law under discussion.

General Section 5583, Laws of 1893, provides:

"In order to make the assessment, such assessor shall demand from each person and firm, and from the president, cashier, treasurer or managing agent of each corporation or association or company within his county, a statement, under oath or affirmation, of all the real estate within the county and the personal property owned by, claimed or in the use, possession or control of such person, firm, corporation, association or company."

Section 5584 provides:

"The list shall be signed and sworn to by the person making it and the oath thereto may be administered by the assessor or his deputy."

Section 5586 provides:

"All property is to be valued to the assessor by the person whose duty it is to list the same."

By section 5585 the assessor is required to return a list of the personal property statements, and in connection therewith is required to make oath as follows:

"And in no case have I omitted to demand of any person of whom I was required to make it, a statement of the amount and value of his property, which he was required by law to list."

Section 5589 provides:

"Every inhabitant of this territory of full age and sound mind * * * shall list all property subject to taxation in this territory of which he is the owner * * *"

The act of March 5th, 1895, session laws, 1895, 232, which provides for the assessment and taxation of property located in territory attached for judicial purposes provides:

"* * * Such special assessor shall have the powers and be required to perform all the duties of the township assessor * * *

Session laws, 1895, page 230, which provides for the assessment of transient property contains a provision to the effect that the assessor shall list all property for taxation, unless the owner thereof shall show to the assessor, under oath, that the same property has been listed for taxation, for that year, in some other state or county of this territory. If these statutory provisions are construed together, it will be an easy matter for the assessor to ascertain, in the manner provided by law, what property is exempt from taxation. It is not necessary to this contention to say that the plaintiffs were not exempt from taxation, nor their property which had been taxed for the same year in another place. The first question to be determined is, are these statutes to govern the

assessor, or is the assessor to govern these statutes? If no harm has been done plaintiffs in this case, by reason of the fact that they have no rights to be protected, as claimed in their petition, the question still remains, what would be the result to those who have rights to be protected if the statutory requirements are ignored? If the tax levy complained of is void, because the property was not assessed in the manner prescribed by law, it is immaterial that the property might be subject to taxation if legally assessed.

In addition to other statutory provisions in reference to the method of assessing property, Section 1, Article 6, laws of 1895, page 233, contains this provision:

"That in case said property at any time has by oversight or neglect, or for any other cause, been irregularly, illegally or defectively assessed, it shall be lawful for the special assessor to assess or reassess the same, as the case may be, and when done the same shall be valid for all intents and purposes, and in performing his duties under this section he may make out his assessment rolls or list from the best evidence attainable."

It may be contended by defendants in error that the general statutes of the territory, with reference to assessments, are not controlling in a case like the

present by reason of the provisions just quoted. In order for the court to say such a contention states the law, it will be necessary to hold that this provision by implication repealed all other statutes on the subject. The act just quoted from does not pretend to repeal anything, and if the legislature had intended to repeal the various other statutory provisions some special or general repealing clause would have been enacted. Repeals by implication are not favored in law; and by construing this statutory provision to mean that in the event that the amount and value of the property cannot be ascertained by methods otherwise provided, the assessor may make out his assessment rolls from the best evidence attainable, as parts of the law are in harmony.

The statute quoted seems to provide that the special assessor may resort to other means to ascertain the amount and value of the property only in cases where "oversight or neglect, or for any other cause property has been irregularly, illegally or defectively assessed," and such appears to us to be the meaning of the statute. However, if the words quoted have the general application to the entire section, it was clearly not the intent of the legislature to repeal the other statutes directing the manner of assessing property and such a construction should not be resorted to

unless the language used is so clear and positive as to admit of no possibility of harmonizing the same with the other statutory provisions; and especially is this so in view of the fact that it was clearly not the intention of the legislature to repeal the other statutes.

As to the necessity of conforming to the statutory demand in assessing property, see authorities cited to our first proposition; also,

Waller vs. Hughes, 11 Pac., 122.

Hersey, et al, vs. Board of Supervisors, Barren Co., 37 Wis., 75.

Schettler vs. City of Ft. Howard, 43 Wis., 48.

Cooley on Taxation, 2nd, Ed., 284.

Powder River Cattle Co. vs. Board of County Commissioners, 45 Fed. Rep., 323.

In the last case cited the language of Chief Justice Wade is quoted as follows:

"Under the provisions of our statute it is the first duty of the assessor to demand a list of the property from the taxpayer of the person whose property is to be assessed. This is the first and important step towards assessing his property for taxation. If the list is not furnished on such demand, then, and not until then, has the assessor the right himself to make a list and value the property. The demand is a con-

dition precedent to the right of the assessor to act in the premises. That, and the neglect or refusal of the person having taxable property, alone, gives the assessor the right to make the list himself. If this were not so the sovereign power of taxation becomes an arbitrary exaction, subject to the caprices of a single individual, without the knowledge and behind the back of the person most interested and whose property is to be taken for the public use. Therefore, it is that our statute has wisely provided that the person having taxable property shall have the right to list the same for taxation. The assessor has not the right or jurisdiction to make a list until the tax-payer or person having the property subject to taxation has neglected or refused to make it. * * * " "When the regulations prescribed are intended for the protection of the citizen and to prevent the sacrifice of his property, and by the disregard of which his rights might be, and generally would be, injuriously affected, they are not directory but mandatory." French vs. Edwards, 13 Wall, 506. "The failure to make a demand of the tax-payer for a list of his property might, and generally would, injuriously affect his rights, for if the tax-payer must list the property, whether any demand for the same has been made upon him or not, then the assessor may, on mere information and belief, list his

property and add 20 per cent of the full value thereof, * * * certain the law that requires a demand to be made of the taxpayer for his list of property is intended for his protection, is therefore a mandatory statute." See also N. Pac. R. vs. Corland, 3 Pac., 134; State vs. Nunn, 39 N. J. L., 422.

If the statutes referred to are mandatory, the reason for the statute is immaterial; but in addition to the reasons given for the cases before cited, we have another, or state an additional one, that the taxpayer in some cases has a right to show to the assessor, under oath, that his property has been assessed in some other state or county. If these reasons make the statute in regard to assessment mandatory, it is no excuse for ignoring them that in many cases no injury would result.

Section 1, Article 6, Laws of 1895, 233, also provides:

"That such special assessor shall have all the powers and be required to perform all the duties of the township assessor."

These reasons, in addition to other suggestions offered, make it clear beyond doubt that it was not the intention of the legislature, by the language previously quoted from this section, to repeal all other

statutory directions in reference to making assessments.

It is probably unnecessary for the court to go to the extent which the law seems to demand by holding that assessments in every instance, is void unless the statutory directions for making the same are complied with. Such would doubtless be the better manner of disposing of the case. It would certainly be wiser to leave it to the law making power of the territory, the legislature, to say how the property of the citizens should be assessed, than to leave it to the arbitrary will, whim, or discretion of the various assessors throughout the territory. It is sufficient, however, in the present case to say that a substantial right was denied the plaintiffs, by the failure of the assessor to comply with the statutory command and direction.

Was the property of the plaintiff liable for taxation in Noble county for the year 1899, after taxes had been paid thereon for the same year in the state of Texas, provided it had been shown to the assessor by proper affidavits and proof, that the same property had been so taxed for that year?

It has been contended in similar cases in this court that the provisions of Section 3, Article 5, Laws

of 1895, page 230, do not apply to non-residents of the territory, and this appears to be the only objection that can be urged against our proposition.

This contention from the other side has also been continued by further contention that these reservations are, in effect, a part of the county to which they are attached for judicial purposes, and therefore the law of 1899 exempting property in reservations from taxation, except for court and territorial purposes, is an unlawful discrimination and therefore void. In other words, the contention seems to be that the provisions of Section 3, Article 5, Laws of 1899, do not apply to property situated in Indian Reservations, because they are not a part of the county, and that the provisions of the law of 1899 are illegal and void, because the reservations are a part of the county. The contentions do not appear to us to be in harmony with each other. We admit that the general legislation of the territory, with reference to taxing property in reservations, indicated that the legislature has always considered and dealt with them as separate and distinct taxing districts. But, notwithstanding this fact, there is nothing in section 3 referred to to indicate that the legislature did not intend to use the word "county" in a comprehensive sense, and that was no reason why the language of

the section should be so strictly construed as to exclude property situated in reservations attached to the county for judicial purposes. The machinery for taxing property in these reservations is all provided for in the counties to which they are attached for judicial purposes, and the strict construction contended for would have the effect of exempting property from double taxation when situated in the county proper, and require the same class of persons and property, when situated in a reservation attached for judicial purposes, to bear the burden of double taxation.

Section 6, of the same act, provides:

"When any person is about to remove his property from the county after the same has been assessed, and before the taxes thereon have been paid, without leaving sufficient remaining for the payment of the taxes thereon, the taxes shall at once become due and payable and the treasurer shall issue a tax warrant for the collection of the same, and it shall be enforced as in other cases."

This section has, so far as we are informed, always been construed to include property situated in unorganized territory attached to the county for judicial purposes, and it would require a strict construction, and one which would result in great inequality and damage to the county, to say that section 6, as well as many other provisions of the same act, do not

apply to unorganized territory attached for judicial purposes.

Article 6, page 235, Laws of 1895, makes no provision with reference to the collection of taxes on property in unorganized territory, except that "the officer whose duty it shall be to collect the taxes in the organized county to which such country, district or reservation is attached shall collect the taxes, and is vested with all the power which he may exercise in the organized county." These two acts being passed by the same legislature, it appears to us evident that the word "county," as used in article 5, was intended, and does include, "reservations," and that the legislature intended the same method of collecting taxes and exempting property from taxation on reservations as applied in organized counties.

If the property of the plaintiffs was not liable for taxes in said county for the year 1899 (if proper proof had been made that the same property had been taxed for that year in the state of Texas), were the plaintiffs denied their exemption from taxes by reason of the failure of the assessor to view the property, or to give them any notice that he intended to assess the same, or to appear and present their proof that the property had already been taxed?

It appears to us evident that the assessor would have no power to deny the plaintiffs their statutory rights of exemptions from taxation, if such rights in fact existed, and we assume that our fourth question answers itself. However, the question here involved is discussed in Cooley on Taxation, 2nd Ed., page 361, where the principle is thus stated:

"It is not very often the case, however, that statutory provisions in reference to assessments are not strictly observed and that either the public or individuals will suffer in consequence. The question presented may then be whether the provisions which have been disregarded are mandatory of the officers or it might arise in the terms of some purity of statute which undertakes to heal the defects. In substance, the question will be whether the right to be heard in tax cases is a constitutional right and indefeasible. Upon this subject there is a generai concurrence of authorities in the affirmative. It is a fundamental rule that in judicial or quasi-judicial proceedings affecting the rights of the citizen he shall have notice, and be given an opportunity fo be heard before any judgment, decree, order or demano shall be given or established against him,"

That the assessment of property for taxation is a quasi-judicial proceeding, is, we believe, admitted by all authorities, and it is universally held that not even the legislature can take from the tax-payers the right to a hearing.

In Steward vs. Farmer, 74 N. Y., 183, the court says:

"The legislature cannot more arbitrarily impose assessments for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice older than writen constitutions that the citizen shall not be deprived of his life, liberty or property, without an opportunity to be heard in defense of his right. * * * It has always been the general rule in this country, under every system of assessment and taxation, to give the person to be assessed an opportunity to be heard at some stage of the proceeding. That due process of law requires this has been universally recognized."

In railroad tax cases, 13 Fed. Rep., 722, in refering to taxing a charge upon property by assessment for taxation Mr. Justice Field says:

"The law directing the proceeding must provide for some kind of notice and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredients of due process of law."

Hager vs. Reclamation Dist., 111 U. S., 701.

In Exchange Bank Tax case, 21 Fed. Rep., 99, the court says:

"In the act of 1881, chapter 271, laws of N. Y., the fatal vice was the denial of an opportunity to those assessed to be heard and permitted to obtain the deductions and corrections allowed by the general system of assessment."

In Thompson vs. Gains, 35 Mich., 155, the court says:

"* * * But it follows legitimately from this that parties taxed must have an opportunity to be heard regularly at some stage in the proceeding. Their rights are not to be concluded by proceedings which are wholly ex-parte."

Butler vs. Supervisors, 28 Mich., 22.

Hills vs. Exchange Bank, 105 U. S., 319.

Moore, et al., vs. Hewett, 16 N. E., 905.

We contend that plaintiffs, not only had the right to a hearing at some stage of the proceeding, but that they had the right to the hearing described by the laws of this territory, and that the assessor had no power to disregard these laws, to fix some other time or manner of such hearing. Plaintiffs had the right to expect that the assessor would call upon them and demand a list of their property. The Board of County Commissioners had no power to make an assessment in the first instance, and even though they are given the power to correct errors in assessments these provisions should not be construed so as to authorize a total disregard of the statutory provisions on the subject of assessment of property for taxation. In this case it is no answer to our contention to say that the plaintiffs had a right to appear before the Board of

County Commissioners and have their assessments corrected, having them extended or placing of their property upon the tax rolls. They did appear before the Board of County Commissioners, and upon their request and showing made their property was stricken from the tax rolls as not properly assessable. This hearing, however, amounted to no hearing, because the board, at a subsequent time, and without notice to the plaintiffs or their presence, and without their knowledge, rescinded their action and reaffirmed their former action and the action of the assessor in placing the property of the plaintiffs upon the tax roll, without making any assessment as provided by law. This last proceeding of the Board of County Commissioners, like the proceeding of the assessor, was purely *ex parte*, and the first information which plaintiffs had of this *ex parte* proceeding was the levying upon their property under a tax warrant, issued for the collection of the taxes so assessed and levied, without any opportunity for a hearing, and without a pretense of compliance with any statute of the territory with reference to assessing property.

The property of the plaintiffs has been assessed by a person wholly unauthorized to make the assessment. Every statutory provision with reference to

the mode and manner of making the assessment has been ignored. Plaintiffs have been denied the right to show that their property was not subject to taxation, or the quality and value thereof, as well as many other substantial rights and which would have been fully protected by proceeding in conformity with the statutes, including the right to appeal from the action of the Board of County Commissioners.

If this manner of assessing property and levying taxes is presumed to be under our statutory regulations, then it is not necessary that property should be assessed by an assessor elected or appointed as provided by law, or that the property owner should be requested to give a list and valuation of his property, or that the assessor make return and affidavit of the assessment sheet as directed by statute, or that the tax-payer should have an opportunity for a hearing at any stage of the proceedings, or the right to appeal to a court from the illegal or oppressive acts on the part of the Board of County Commissioners.

These suggestions dispose of our fifth contention, and brings us to the sixth proposition.

Was the property of the plaintiffs situated in the Indian Reservations liable for taxes for the year 1899 in Noble County for purposes other than Court and Territorial funds?

The act of March 10, 1900, provides as follows:

"That from and after the passage and approval of this act, no taxes shall be assessed, levied or collected in any organized county, district or reservation which shall be, or which may hereafter be, attached to any county for judicial purposes, except taxes for Territorial and County funds."

It is evident, that, if the act of March 10, 1899, is valid, that the property of the plaintiffs in error is not subject to taxation except for territorial and county purposes.

It seems to us to be equally evident that if the legislature possessed the power, in the first instance, to levy taxes in the Indian Reservations, that it must likewise possess power to say what kind and character of property should be subject to taxes, and for what purpose it should be taxed.

This act must stand as a valid exercise of legislative authority, unless it is apparent that it contravenes some constitutional or fundamental rule of law, for, in cases of doubt, it is a maxim of law that the doubt must be resolved in favor of the validity of the act, and that it will not be held to be null and void unless it is clearly so. That the legislature had the power, in the first instance, to enact the law assessing property in the Indian Reservations and declaring it subject to taxation, is not disputed, but on the con-

trary it is admitted by the plaintiffs in error; and a subsequent act declaring for what purposes it should be taxed is equally valid, unless it be held that the Indian country attached to organized counties for judicial purposes became, *ipso facto* part of the county to which they were so attached.

The county lines in the Territory of Oklahoma are laid out and prescribed in the acts and proclamations opening the territory to settlement. In the Organic Act, it is provided that these county lines may be changed by the legislature at its first session. No such power is found in the act opening the Cherokee Strip to settlement, and Noble County is a part of the Cherokee Strip, and to this county the reservations in which these taxes were levied was attached for judicial purposes by order of the Supreme Court. If this country, by virtue of being attached to Noble County became a part of the county, the act of March 10, 1899, may be invalid for the reason that it does not provide a uniform system of taxes for the whole of the taxing district, and the test of the validity of the act will be found in deciding whether said Indian country is in fact a part of Noble County, or whether, under the law, it constitutes a separate taxing district.

It will be observed that the purpose which the

Supreme Court is authorized, by the Organic Act, to attach unorganized Indian country to the organized counties of the territory is for judicial purposes. It cannot be inferred that congress, by a grant of this power to the Supreme Court, intended thereby to give the Supreme Court power, *ad libitum*, to change the boundaries of the organized counties of the territory, by attaching or detaching Indian country to said counties at each term of the Supreme Court. Even if the legislature possessed the power to change the boundaries of the counties of the territory, under the grant to it of all "subjects of rightful legislation," it is sufficient for the purposes of this argument to say that the legislature has not seen fit, in the case at bar, to exercise that power; and, so, if the Indian Reservations in question in this case are a part of Noble County for any purpose, it becomes so by virtue of an order of the Supreme Court attaching them to said county for judicial purposes, and if that order makes them a part of said county, it is at once evident that the Supreme Court can, at pleasure, extend or contract the boundaries of any of the counties in the Territory of Oklahoma, by making an order attaching Indian country to them for judicial purposes.

It is contended by plaintiffs in error that the leg-

islature, itself, under the grant in the Organic Act to change the boundaries of the seven original counties of the Territory of Oklahoma and the grant in the Organic Act to pass laws on "all rightful subjects of legislation," does not possess the power to, and could not extend the boundaries of any county so as to include unorganized Indian country within the boundaries of any county, so as, in fact, to make said Indian country a part of the county.

In Thomas vs. Gay, 169 U. S., 264-284, the Supreme Court of the United States says:

"The Organic Act, as we have already seen, extends the exterior boundaries of the territory around these Indian Reservations. It also provided for the division of the territory into council and representative districts and for the election of the legislative assembly and delegate to congress. The Indian Reservations were not included within any of the council or representative districts. The act provided that there should be seven counties and fixed the county seats, and under the authority of the act the governor established the boundaries of these counties. The legislature was authorized to change the boundaries of the original counties, but were not given authority to include these reservations or any lands not then open to settlement in any of the counties."

If the grant of power to the legislature, contained in the Organic Act, did not authorize it to include Indian country in the boundaries of any county, it

can hardly be contended that the power granted to the Supreme Court, by the Organic Act, to attach unorganized country of the Indian Reservations to the organized counties for judicial purposes, conferred power on the court to make the country so attached a part of the county to which it was attached. So it is evident to us that it cannot be successfully contended that this portion of the Indian country so attached to Noble County became a part of Noble County; hence it must remain a separate taxing district, and if it is a separate taxing district the act of March 10, 1899, is valid, for different rules of taxing can be established in different taxing districts, without violating the rule that the taxation must be uniform. This rule of uniformity is only violated when taxation is not uniform within the district in which taxes are levied and assessed and the law creating them is to operate.

In Thomas vs. Gay, *supra*, it is said:

"Without undertaking to enumerate all the instances in which there is some difference of procedure in respect to property assessed within the organized counties and the property assessed in the unorganized districts and reservations, or to consider minutely the several objections that are urged to such differences, we do not perceive that the questions suggested are for the courts. Clearly, these are mat-

ters of detail within the legislative discretion. It is the law-making power which is to determine all questions of discretion or policy in apportioning taxes; must make all rules and regulations and decide upon the agencies by means of which the taxes are to be collected."

It was, clearly, then within the power of the law-making body in this case to determine what proportion of the burdens of taxes that property situated in the Indian Reservations should bear, and the legislature in determining that question seems to have done so on the lines of natural justice. The act of March 10, 1899, only makes property in these reservations bear their proportion of the burdens of that part of the territorial and county governments from which they derive some benefit in the protection of their property and in the maintenance of their rights.

It seems that the legislature in passing this act knew that the people in these reservations did not, and could not, receive any benefits from the other funds for which this property was made subject of taxation in organized counties, than court and territorial funds, and for this reason they should be exempt from the burden of paying taxes for the funds from which they could derive no direct and immediate benefits.

As said, before, the act of March 10, 1899, is a

valid exercise of legislative power and discretion in the levying and assessment of taxes, if that reservation is a seperate taxing district. These reservations enjoy none of the blessings of the county governments, and no necessity, therefore, exists for taxing the owners of property located in said reservations for the general purposes of establishing and maintaining county government. In these reservations no provisions of law exists, or have ever existed, providing for township governments, for the organization of school and road districts, or for the establishment of villages, towns and cities; and hence, the legislature did not see fit to make the property therein located subject to taxation for these purposes, when from them the residents and tax-payers of said district did not derive any benefits.

But this reason does not apply to the two funds for which taxes are authorized to be levied on property in said districts. The inhabitants of said district receive here the same benefits from the general laws of the Territory of Oklahoma in the protection of their rights to person and property that the inhabitants of organized counties do; and the courts established in organized counties are as freely open to the inhabitants of the unorganized Indian country as they are to the inhabitants of the organized county. And

for this reason the legislature deemed it right and expedient that the inhabitants of these reservations should bear their proportion of the taxes in supporting the burdens of territorial government and in the administration of justice.

The legislature is the sole power to designate and establish taxing districts; and it is beyond the power of the court to interfere with this right of the legislature. The legislature must be left to a free exercise of this right and to the methods by which it arrives at its conclusions.

In Cooley on Taxation, page 149, it is said:

"When the nature of the case does not conclusively fix it the power to determine what shall be taxing districts for any particular burden, is purely a legislative power, and not to be interfered with or controlled, except as it may be limited or restrained by constitutional provision. The 'Judicial tribunal,' it has justly been said, 'cannot interfere with the legislative discretion, however onerous it may be.' And when it was objected that a certain construction of a a statute would throw upon one locality the expense of constructing a road for state purposes, 'the conclusive answer' was declared to be 'that the state may impose such a burden where, in the wisdom of the legislature, it is considered that it ought to rest.' * * * * The legislature judges finally and conclusively upon all questions of policy, as it may also upon all questions of fact, which are involved in the deter-

mination of a taxing district. And, having the authority to determine what shall be taxing districts, the legislature must also be left to its own methods of reaching the conclusion."

It is further said, by the same learned author, that taxing districts may be as numerous as the purposes for which taxes are levied.

People vs. Brookley, 4 N. Y., 419.
Shaw vs. Dennis, 10 Ill., 405.
Philadelphia vs. Field, 58 Pa. St., 320.
Langhorn vs. Roberson, 20 Grat., 661.
Caldwell vs. Connersville, 8 Ind., 358.
Malchus vs. Highlands, 4 Bush, 547.

In Howell vs. Buffalo, 37 N. Y., 267, the court, by Justice Parker, say:

"The legislature was not bound to apportion the taxes among the taxable persons within the city, but might, according to its own view of justice and right, proportion the whole among a part of such persons."

In Hill vs. Higdon, 5th Ohio St., 243, it is said:

"The right to tax for such a purpose necessarily includes power to determine the extent and upon what property the taxes should be levied, and that its imposition upon the property, practically and substantially benefitted by the improvements, was but a lawful exercise of the discretion with which the legislative body was invested in apportioning the taxes."

In People vs. Whyler, 41 Cal., 351, the court, by Chief Justice Rhodes, say:

"A tax is equal and uniform when it reaches and bears with like burden upon all the property within the given district, county, etc. It bears the like burden when the valuation of each parcel is ascertained in the same mode—the mode prescribed by law—and when it is subject to the same rate of taxation as other property within the district, county, etc. Absolute equality is unattainable, and the benefits derived or to be derived from the expenditure of the tax cannot be taken into account."

In Coburn vs. Richardson, 16 Mass., 213, the court, by Chief Justice Parker, say:

"Numerous are the inconveniences and great is the injustice which may flow from the statute. But it is for the legislature alone to determine whether these are, or are not, counterbalanced by any great public good which may be expected to be produced by it."

In Comer vs. Folsom, 13 Minn., 219, the court, by Chief Justice Wilson, say:

"It is generally true that a city, town or county, in expending money for the advancement of its own local interests, either directly or indirectly benefits some other sub-division of the state. If it builds a road or bridge, or aids in building a railroad, or in making any other public improvement from which benefit to itself it expected to accrue, frequently some other sub-division of the state is directly and equally benefitted; but it has not been considered that this would be a legal objection to an appropriation of tax

for such improvement. If our constitution requires absolute or perfect equality in taxation, such objection would perhaps have to be admitted. But perfect equality is not required, nor is it possible. All taxes 'should be as nearly equal as may be' in the language of the constitution. If the taxes imposed are distributed on just principles applicable alike to all for whose benefit the appropriation was made or intended, substantial equality is attained, and no constitutional right invaded."

In Marshal vs. Doniphan, 10 Bush, 631, the court, by Justice Lindsey, say:

"As a general proposition, taxation to be constitutional must be as nearly as practicable equal and uniform. To that general rule, however, there are well recognized exceptions. When all are alike benefitted by the taxation, the burden should be a common one; but when the benefits are special and peculiar, the contributions may be so made as to exempt from taxation those persons who are by the law itself, excluded from all participation in the advantages which are expected to arise from the system, institution or improvement to the establishment, construction or maintenance of which the money raised is to be appropriated.

In Cooley on Taxation, page 152, it is said:

"It is not essential that the political districts of the state shall be the same as the taxing districts, but special districts may be established for special purposes wholly ignoring the political divisions. A school district may be created of territory taken from two or more townships or counties, and the benefits of

a highway, levee, or a drain may be so peculiar that justice would require the costs to be levied either upon part of the township or county, or upon parts of several such sub-divisions of the state. In some states there may be township governments within a city, or a city within the bounds of a township, and the fact will create a necessity for special taxing districts, since otherwise taxation for some local purpose could not possibly be properly apportioned. And railroads which extend through several of the ordinary taxing districts may seem to require districts specially created, and having regard to no other property. It is compulsory that the political divisions of the state shall be regarded in taxation only where the tax itself is for a purpose specially pertaining to one of them in its political capacity so that, as already stated, the nature of the tax will determine the district. Even when the purpose for which a tax is demanded pertains to the state at large, or to one of its divisions, so that a general levy throughout the state or such division is essential, there may be peculiar reason why a part of the general public, who are concerned in the purpose, should bear a portion of the burden greater than that which should be borne by the others. A pertinent illustration might perhaps be the case of a tax for the construction of a state capitol. It would be clear, we would say, that such a tax should be spread over the state at large, because the purpose is a state purpose, and every individual in the state is directly interested in its accomplishment. But it is also apparent that the people and the property at the place where the structure is proposed to be constructed would receive special, and probably very great benefits in consequence of the construction beyond

what they would receive in common with all others. The fact is often recognized in the voluntary contributions which are made by the people to secure the location and construction of state buildings at the place where they reside or own property; and the question then arises whether these peculiarities may not constitute a basis for special taxation. To make them such it would be necessary there should be two taxing districts; the one embracing the whole state, and the other embracing only the district which, in the opinion of the legislature, was so peculiarly benefitted as to justify exceptional burden upon its people and property. In such a case the people within the minor district, which is also embraced within the larger district, would contribute twice to the same burden; but this, though apparently a violation of the principles of taxation is not so in fact, if the establishment of the minor district has only equality and justice in view, and if each tax payer, though twice called upon, is by the two assessments only required to pay what, as between himself and the rest of the state, has been found to be his just proportion of the burden, though general in its nature, distributes its benefits unequally."

In the light of the foregoing authorities, it seems to us to be clear that the act of March 10, 1899, does not contravene the rule of uniformity in the levying and assessment of taxes, but merely creates a separate levying district.

It cannot be denied that the people living in and the property located in Noble County, receive a

greater benefit from the general taxes levied than do the people residing and the property located in the Indian Reservations attached to said county for judicial purposes, and hence the necessity and wisdom of separate taxing districts; and, as we have seen, even when part of the people in a particular district are called upon to pay a greater proportion of the taxes than other people residing in the same district, the law is not invalid, where the persons and property subject to the higher taxation receive special or particular benefits arising therefrom that the persons and the property paying a small proportion of the taxes do not share in.

This act seems to us to have been conceived in a spirit of equity and justice to the persons and property residing and located in the Indian Reservations. It takes from their shoulders the burden of contributing taxes for the establishment and maintenance of that portion of the county government from which they derive no benefit, and makes them contribute equally with the people and property in the organized county in maintaining that part of the government from which they derive equal protection and benefit. It is true that the legislature perhaps had power and authority to compel the plaintiffs in error to share in the burdens of maintaining the entire

county and municipal government of Noble County, but it has seen fit to adjust the burdens upon a principle, equitable and just, alike to the organized county and to the unorganized Indian country.

The enforcement of the laws in the Indian Reservations and the protection of property therein is a subject which the inhabitants of that country have as deep an interest in as the inhabitants of the organized county; and thus the legislature has called upon the inhabitants of the Indian country to assist in maintaining by taxation. The inhabitants ot the Indian country have as free access to the courts of the organized counties and to their processes as the inhabitants thereof have, and it is but just and proper that they should be called upon to contribute their proportion in taxes to defray the expenses of maintaining the courts, and the legislature has very properly called upon them to pay taxes for this purpose. It would be unjust to call upon the inhabitants of the Indian country attached to the organized counties to pay road taxes, when the only benefit they would derive from the roads in the organized county would be the right they possess in common with every other person, whether citizen of the United States or an alien, to travel over the roads, and the

legislature, in its wisdom, has very properly seen fit not to burden them with this taxation.

The legislature had the power to make the inhabitants of the Indian country attached to organized counties pay taxes for the maintenance of public schools in the organized counties, but recognizing the fact that the inhabitants of said Indian Reservations derive no benefit from the public schools established and maintained in the organized counties, the legislature, in its wisdom, very properly refrained from imposing the burden of assisting in the establishment and maintenance of schools upon the inhabitants of the unorganized country attached to the organized county; and so it is with each and every one of the funds from which the persons and property of the inhabitants of the Indian Reservations are exempted. In each of them, the inhabitants of said country and the property therein located, receive no direct advantage or benefit, and, therefore, the legislature has not called upon them to assist in maintaining these funds, or to defray the expenses incident to operation of that part of government from which they derive no benefit. In the two funds, in which they have a direct interest, and from which they receive benefits to both their person and property, they are called upon

to contribute.

We believe that a carefnl review of the authorities cited in this brief will, inevitably, lead to the conclusion that the assessment of the property of the plaintiffs in error herein was void, for each and every reason stated in their petition for injunction.

Respectfully,

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